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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/356,771	07/16/1999	JOSEPH E. PORCELLI	1310-2	8276
7590 01/23/2009 Thomas M. Galgano, Esq. GALGANO & ASSOCIATES, PLLC SUITE 204 20 W. PARK AVE. LONG BEACH, NY 11561				
EXAMINER DUCKWORTH, BRADLEY				
ART UNIT 3632		PAPER NUMBER		
MAIL DATE 01/23/2009		DELIVERY MODE PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

09/356,771

Applicant(s)

PORCELLI, JOSEPH E.

Examiner

BRADLEY H. DUCKWORTH

Art Unit

3632

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 25 October 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 18 and 20-22 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 18, 20-22 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 10/25/07 has been entered.

Claim Rejections - 35 USC § 112

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 18 and 21 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. The claims recite that the V-shaped fingers define an obtuse angle there between. This is not shown or described in the application as filed. From the figures it is not clear that the V-shaped members define an obtuse angle, as first they are not to scale, second there is no mention of an obtuse angle in the specification, and third the fingers of the second embodiment appear to define a right angle. This limitation was also seen as noncritical to the invention, as first is not described in the written description and secondly because the angle defined by the

fingers would not affect the functionality of the device, since the fingers flex at the connection to the top wall and not at the midpoint of the V.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 18 and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hartmann et al(US005938160) in view of Jackson(D228335) further in view of Bieck et al(US005839711). Hartmann discloses a unitary plastic beverage container holder comprising: a basket (14) having two side walls (in Fig. 3, defined as the left and right portions of 10 when split into equal halves) each having a top edge (at 15 - Fig. 1) collectively defining a top end opening, the two side walls disposed opposite one another and each having at least two openings (the openings are separated by member 14 shown in Fig. 1) there through disposed beneath the top edge border, four resilient fingers (16) coupled to the basket and depending from one of the top edge borders such

that they each extend downwardly and inwardly into a different one of the side wall openings, and a generally U-shaped hook (18) attached to and extending above the basket. Hartmann does not disclose the basket and opening being rectangular or the use of V-shaped fingers. First with regards to shape, the use of rectangular holders for rectangular beverages is well known, as taught by Jackson. Referring to the figures of Jackson a rectangular holder is shown that can hold either rectangular or cylindrical containers. It would have been obvious to one of ordinary skill in the art at the time of invention to make the holder of Hartmann rectangular to hold rectangular containers. As stated above Hartmann discloses a holder with resilient fingers; however Hartmann does not disclose the use of V-shaped fingers that define an obtuse angle and that point inwards. Bieck et al teaches another cup holder with resilient V-shaped fingers (28 in figure 2) that define an obtuse angle there between and point inwards, the fingers for providing a secure fit for different sized containers placed in the holder. It would have been obvious to one of ordinary skill in the art at the time of invention to place the V-shaped fingers of Bieck on the holder of Hartmann as this would allow the holder to securely support different sized containers as taught by Bieck.

Claim 21 is rejected under 35 U.S.C. 103(a) as being unpatentable over Miller et al(US005297767) in view of Jackson (D228335) further in view of Bieck et al(US005839711). Referring to figure 2 Miller teaches a beverage container comprising a rectangular tray (20) and a pair of spaced apart openings (30 and 40) the openings each having a set of four inwardly extending resilient members (45). The support comprising support members (38 and 48) rotatable to below the openings. Miller

however does not teach the use of a rectangular opening or the use of V-shaped resilient members that define an obtuse angle. First with regards to shape, the use of rectangular holders for rectangular beverages is well known, as taught by Jackson. Referring to the figures of Jackson a rectangular holder is shown that can hold either rectangular or cylindrical containers. It would have been obvious to one of ordinary skill in the art at the time of invention to make the holes of Miller rectangular to hold rectangular containers. As stated above Miller discloses a holder with resilient fingers; however Miller does not disclose the use of V-shaped fingers that define an obtuse angle. Bieck et al teaches another cup holder with resilient V-shaped fingers (28 in figure 2) that define an obtuse angle there between and point inwards, the fingers for providing a secure fit for different sized containers placed in the holder. It would have been obvious to one of ordinary skill in the art at the time of invention to place the V-shaped fingers of Bieck on the holder of Miller as this would allow the holder to securely support different sized containers as taught by Bieck.

Claim 22 is rejected under 35 U.S.C. 103(a) as being unpatentable over Miller et al in view of Jackson in view of Bieck et al and further in view of Pratt(US004530480). Miller in view of Jackson in view of Bieck et al teaches a beverage holder as detailed above, which does not disclose the use of a spring to bias the supporting member (38 and 48) into position below the opening. Pratt discloses a container holder (fig 2) having a spring means (60) for biasing a support member (44) into a lowered position. It would have been obvious to one of ordinary skill in the art at the time of invention to modify the

holder of Miller to include a spring means as taught by Pratt as this would allow automatic positioning of the support member as taught by Pratt (col. 5, Liners 2-11).

Response to Arguments

Applicant's arguments filed 10/25/07 have been fully considered but they are not persuasive.

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to BRADLEY H. DUCKWORTH whose telephone number is (571)272-2304. The examiner can normally be reached on m-f 8:30-5.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, J. Allen Shriver can be reached on 571-272-6698. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/B. H. D./
Examiner, Art Unit 3632

/J. ALLEN SHRIVER II/
Supervisory Patent Examiner, Art Unit 3632